



Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement

Posted by [Matthew Rimmer](#) on December 11, 2013

On the 5th December 2013, Australia and Korea announced that they had finalised a new free trade agreement. Is it a fair trade fairytale? Or is it a dirty deal done dirt cheap? It is hard to tell, because the respective governments have not yet published the text of the Korea-Australia Free Trade Agreement (KAFTA). There has been much debate in the Australian Parliament over the transparency of the trade agreement; the scope of market access provided under the deal; and the impact of the investment chapter, with an investor-state dispute settlement clause. KAFTA foreshadows the approach of the new Conservative Government in Australia to other trade deals – such as the Trans-Pacific Partnership.

1. Secrecy

There has been much debate about the lack of transparency surrounding KAFTA, and the haste with which the new Coalition Government has finalised the agreement.

In Question Time on the 9th December 2013, there was a show-down on the topic between the Coalition Government and the Australian Labor Party Opposition.

The Minister for Foreign Affairs, Julie Bishop, received a question about the benefits of the free trade agreement in South Korea. Bishop argued that the deal was ‘good news’. She said that the agreement ‘is going to help grow our economy, it will provide certainty for investors and it will certainly create an environment for more jobs in Australia’. Bishop maintained: ‘This Korea-Australia free trade agreement will lift key tariffs off key agricultural products.’ She noted: ‘Some Korean tariffs are as high as 300 per cent and we will see a number of them reduced to zero on key agricultural products, particularly beef.’ Bishop also emphasized: ‘Tariffs also go to zero on wine, wheat, canola oil, seafood, tomatoes, grapes and others.’

The Shadow Minister for Foreign Affairs, Tanya Plibersek, took a point of order, and asked the Coalition Government to table the text of KAFTA. Bishop declined the invitation.

On the 11th December 2013, Senator Penny Wong, the Senate leader of the Australian Labor Party Opposition moved a motion in the Australian Senate:

‘That the Senate— (a) notes that the United States Trade Representative has undertaken to publish the full text of all free trade agreements negotiated on behalf of the United States of America (US) ‘well before’ signing to invite further comments from the US Congress and the US people;

(b) resolves that the Australian Senate and the people of Australia are entitled to scrutinise proposed agreements before signing; and (c) orders that there be laid on the table by the Minister representing the Minister for Trade, the full text of the proposed Korea-Australia Free Trade Agreement, the Trans-Pacific Partnership Agreement and other bilateral and plurilateral trade agreements at least 14 days before signing.’

This motion was supported by the Australian Labor Party and the Australian Greens, and a majority of the Australian Senate.

The Coalition Government face sanctions and remedies if it fails to produce the documents ordered by the Australian Senate. The Coalition Government has claimed a public interest immunity against the production of trade documents, already, in respect of the Trans-Pacific Partnership.

2. Market Access

The Trade and Investment Minister Andrew Robb has been spruiking the Korea-Australia Free Trade Agreement, while defending the secrecy of the text.

The Minister maintained: ‘As a result of the Agreement, tariffs will be eliminated on Australia’s major exports to Korea and there will be significant new market openings in services and investment’. He insisted that ‘the FTA translates to higher economic growth and more jobs for Australians.’

The Minister contended: ‘As part of the FTA, tariffs of up to 300 per cent will be eliminated on key Australian agricultural exports such as beef, wheat, sugar, dairy, wine, horticulture and seafood, as well as resources, energy and manufactured goods.’

Robb commented: ‘Independent modelling shows the Agreement would be worth \$5 billion between 2015 and 2030 and boost the economy by around \$650 million annually after 15 years.’ However, such modelling has not been publicly available or open for analysis.

The Minister emphasized in an editorial in The Australian Financial Review that ‘the opening up of the major markets of Asia is essential if Australian businesses are to successfully compete with the world in the years ahead.’

The rural newspaper, *The Land*, was hopeful that 'the deal means the relationship between Australia and Korea has moved on from fading memories of a 1950s war and catchy pop songs such as Gangnam Style.'

The National Farmers' Federation was enthusiastic about the deal. President Brent Finlay commented: 'While the deal doesn't deliver everything the Australian agricultural sector had advocated for, it is a strong step towards securing Australia's important trading future with Korea.'

However, there has been dissent from some quarters of agricultural communities. The Ricegrowers' Association of Association has been disappointed that KAFTA excludes rice. Ruth Wade, the executive director, commented: 'Today's announcement that the Government has signed an FTA with Korea which excludes rice is particularly disappointing.' She noted: 'We have strongly supported the Australian Government's efforts to finalise these trade agreements but only if they are comprehensive, and do not exclude any agricultural products.' In her view, 'This is an FTA in name only'. Wade concluded: 'Trade agreements with exclusions are not free trade agreements.'

The manufacturing industry was also wary of the deal. The Australian Manufacturing Union has condemned the agreement with South Korea. Paul Bastian, the union's national secretary, observed: 'The auto-sector is already under pressure.' He worried that 'The productivity commission has raised concerns that we already lack an even playing field.' Industry doomsayers are concerned that KAFTA will spell the death of the domestic car industry in Australia.

It will be worthwhile for an independent organisation such as the Productivity Commission to engage in empirical analysis of the impacts of KAFTA.

The experience of the Korea-United States Free Trade Agreement is sobering. Public Citizen reported that on the anniversary of the implementation of the agreement, US exports to Korea were down 9%, and imports from Korea were up. The United States trade deficit with Korea had swollen by 30%.

3. Investment

Controversially, the Australian Coalition Government agreed to an investor-state dispute settlement clause in KAFTA. The Coalition has boasted that the deal shows that Australia is open for business. Critics would observe that Australia is also open to litigation.

The Prime Minister's Office released a fact sheet on the agreement, elaborating upon the investment clause. The Coalition Government emphasized that 'the FTA includes an investor-state dispute settlement mechanism' and 'the Government has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as

public welfare, health and the environment'. The Coalition maintained that 'This will provide new protections for Australian investors in Korea as well as Korean investors in Australia, promoting investor confidence and certainty in both countries.'

This decision is extremely controversial. Senator Penny Wong from the Australian Labor Party said that the investment clause was 'a particular matter of concern for Labor'.

Senator Peter Whish-Wilson from the Australian Greens objected: 'The investor-state dispute resolutions provision exposes future governments to being sued for simply making laws on behalf of their citizens'. He commented: 'We have no confidence that there are any safeguards in place to prevent a litigation free-for-all that would reduce the sovereignty of our national and state parliaments.' Senator Peter Whish-Wilson raised the example of Archer Daniels Midland suing Mexico under an investment clause under the North American Free Trade Agreement. He wondered whether the multinational company would sue Australia under an investment clause, given that its bid for GrainCorp was recently rejected under a National Interest Test.

[Whish-Wilson: Under ISDS provisions could foreign investors sue over changes to Australian policy?](#) (Watch video)

Given the sharp rise in investment cases, the inclusion of an investment clause in KAFTA is not a smart strategy. In April 2013, UNCTAD released a report on [Recent Developments in Investor-State Dispute Settlement \(ISDS\)](#). The report revealed that 62 new cases were filed in 2012, 'confirming the increasing tendency of foreign investors to resort to investor-State arbitration'. The report also highlighted the outcomes of disputes. UNCTAD observed of the 244 concluded cases: 'Out of these, approximately 42 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 27 per cent of the cases were settled.' Academic research has also indicated that arbitrators in investment tribunals have taken a broad view of their powers, and have shown little inclination to take into account national interest concerns, particularly about labor, the environment, and health.

A great problem has been that investment clause public interest exceptions and carve-outs have not necessarily been effective means of protecting the public interest. The North American Free Trade Agreement recognises the importance of the environment, health, and safety. Nonetheless, in spite of such 'safeguards', Stephen Harper's Canadian Government has faced investment challenges from multinational companies worth billions of dollars, including in respect of its drug patent laws, and a Quebec moratorium on fracking.

How will flagship Korean companies use an investment clause? Samsung is engaged in a global patent war with Apple. If Samsung's prospects falter in Australia in the patent litigation against Apple, the company could challenge Australia's patent laws and regulations, under an investment clause. Hyundai could challenge

Australian support in respect of car manufacturing on the grounds that it adversely affected its foreign investments.

The Australian Government should reconsider its risky adoption of investment clauses in free trade agreements – such as KAFTA.

Conclusion

At present, KAFTA is a Kafkaesque agreement – with its secret texts, speculative claims, and shadowy tribunals.

The trade strategy of the Coalition Government in respect of KAFTA is perhaps a good indication of its approach in the Trans-Pacific Partnership.

Just as it has kept KAFTA under wraps, the Coalition Government has defended the secrecy of the Trans-Pacific Partnership. Indeed, the Coalition Government has refused to comply with an order from the Australian Senate to produce the texts of the Trans-Pacific Partnership. The Australian Senate is considering sanctions and remedies in respect of this failure to produce the documents associated with the Trans-Pacific Partnership.

The Coalition Government will no doubt also pursue agricultural objectives in the Trans-Pacific Partnership. Japan has been pushing for wide exemptions in agriculture in the fields of rice, wheat, beef, pork, dairy and sugar. Accordingly, it will be struggle for the Coalition Government to win a comprehensive deal on access to agricultural markets in the Trans-Pacific Partnership.

In the Trans-Pacific Partnership negotiations, the Trade and Investment Andrew Robb also appears willing to trade away investment rules in return for greater access to markets, particularly in respect of agriculture: 'If there is a substantial market access offering, and if we can also succeed in getting exclusions and protections to safeguard certain public policy measures then we will be prepared to put it on the table, but it is not on the table yet.' He stressed: 'The Australian government has said it's prepared to consider on a case by case basis the possible support for an ISDS – investor state dispute settlement procedure.' Robb maintained: 'We have said we are prepared to consider that in the context of the TPP provided there is a substantial market access result and other conditions are met.' In particular, the Trade and Investment Minister is keen on obtaining access for sugar.

This is a dangerous strategy, particularly given how transnational corporations have used and exploited investment clauses to challenge a wide range of public regulation. There has also been doubt amongst trade commentators about the wisdom of trading away 21st policy flexibilities in order to gain access to markets for 18th century products like sugar.

Nobel Laureate Professor Joseph Stiglitz has warned of the dangers of such deals: 'The Trans-Pacific Partnership proposes to freeze into a binding trade agreement many of the worst features of the worst laws in the Trans-Pacific Partnership countries, making needed reforms extremely difficult if not impossible.'



All work on infojustice.org is licensed under a [Creative Commons Attribution 3.0 Unported License](https://creativecommons.org/licenses/by/3.0/).

View [original article](#).